82-1554

NO.

IN THE

Supreme Court of the United States

October Term, 1982

CHARLES E. STRICKLAND,
Superintendent
Florida State Prison;
JIM SMITH, Attorney General
of Florida, and LOUIE L. WAINWRIGHT
Secretary, Florida Department
of Corrections,

Petitioners,

vs.

DAVID LEROY WASHINGTON,

Respondent.

On Petition for a Writ of Certiorari
to the United States
Court of Appeals for the
Former Fifth Circuit (Unit B)

BRIEF OF PETITIONER ON JURISDICTION

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QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS IN EXPRESSLY OVERRULING THE SUPREME COURT OF FLORIDA AND EXPRESSLY REJECTING THE EN BANC OPINION OF ANOTHER COURT OF APPEALS, HAS APPLIED THE CORRECT STANDARD FOR REVIEW OF CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL?

2. WHETHER THE COURT OF APPEALS HAS MISAPPLIED FAYERWEATHER v. RITCH, 195 U.S. 276 (1904) TO EXCLUDE A STATE TRIAL JUDGES TESTIMONY OR WHETHER THAT DECISION SHOULD BE OVERRULED OR LIMITED, WHERE THE STATE TRIAL JUDGE TESTIFIES AS AN EXPERT AND AS THE PRESIDING JUDGE, THAT THE NEW EVIDENCE OFFERED BY THE DEFENDANT WOULD MAKE NO DIFFERENCE UPON THE IMPOSITION OF THE DEFENDANT'S SENTENCE.

3. WHETHER THE COURT OF APPEALS CORRECTLY REVERSED THE DENIAL OF THE RESPONDENT'S HABEAS CORPUS APPLICATION WHILE FAILING TO CONSIDER OR APPLY THE PRESUMPTIVE VALIDITY AND FACTUAL FINDINGS OF FOUR STATE COURTS AND THE DISTRICT COURT.

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I

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, is reported at Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982)(Unit B)(Former Fifth)(en banc) (A1-A204)[1]. The opinion of the United States District Court for the Southern District of Florida is printed at A250-A292 and is presently unreported.

The opinion of the Supreme Court of Florida is reported at Washington v. State, 397 So.2d 285 (Fla. 1981). (A241-A249). The opinion of the Florida Eleventh Judicial Circuit Court in and for Dade County, Florida, is printed at A205-A240 and is unreported.

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[1]The symbol "A" designates the pagination in the State's separate Appendix.

The opinion of the Florida Supreme court recognizing the Eleventh Circuit holding herein, but refusing to follow it, is reported at Armstrong v. State, ___So.2d___(Fla. 1983), Fla.Sup.Ct. Case No. 67,871, opinion filed January 20, 1983 (R293-R321).

II

JURISDICTION

On December 23, 1982, the United States Court of Appeals for the Eleventh Circuit, sitting en banc reversed and remanded the United States District Court's denial of the Defendant's Petition for a Writ of Habeas Corpus. Neither the State nor the Defendant filed a motion for a rehearing.

The jurisdiction of this Honorable Court is invoked pursuant to the specific provisions of Rule 17 of the Rules of the Supreme Court; Title 28 U.S.C. §1254(1)

and Amendments VI and XIV of the United States Constitution.

III

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment VI of the Constitution of the United States provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amendment XIV of the Constitution of the United States provides inter alia, that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

> the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title 28 U.S.C. §2254(a) provides that:

> "The Supreme Court, a justice thereof, a circuit judge or a District Court shall entertain an application for a Writ of Habeas Corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

IV

STATEMENT OF THE CASE

This is a Petition for Certiorari from the opinion of the Eleventh Circuit sitting en banc, in which the Court reversed the denial of the Defendant's Petition for a Writ of Habeas Corpus arising from his state convictions for first degree murder and three sentences

of death in Washington v. State, 362 So.2d 658 (Fla. 1978), cert. den., 441 U.S. 937 (1979). The Defendant confessed and pleaded guilty to all charges. Id. Neither the propriety of his plea nor his confessions are challenged herein. In the present case the Defendant only challenges whether his counsel provided effective assistance at the time of sentencing.

In a ten day period beginning on September 20, 1976, the Defendant committed three of the most brutal murders in Florida's history[2]. Id. at 660-665. On

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[2]A fourth "comatose" victim died subsequent to the original opinion of the Florida Supreme Court. See, Washington v. Strickland, 693 F.2d 1243, at 1247, n 1 (5th Cir. 1982)(A91).

October 1, 1976, the Defendant surrendered to Dade County Police after his two accomplices were arrested for the murder of "Meli." See, Washington v. Strickland, 693 F.2d at 1247 (A5-A6). The Defendant confessed to the Meli killing in a lengthy statement. Id. On October 7, 1976, the State indicted the Defendant for the Meli murder and appointed William Tunkey, an experienced criminal lawyer, to act as his attorney. Id.

On November 5, 1976, the Defendant acting directly against Tunkey's advice, confessed to the "Pridgen" and "Birk" murders. Id. Acting against Tunkey's advice, the Defendant waived his right to a jury trial as to all three murders and pleaded guilty to all charges before the Honorable Richard Fuller. Id. During the plea colloquy, the Defendant stated that he did not have a significant prior

criminal record and explained to Judge Fuller that his actions were the result of extreme stress and anxiety due to his unemployment and his corresponding inability to provide for his family. A6-A7. The Defendant stated however, that he accepted full responsibility for his crimes. Id. Judge Fuller responded that he had a "great deal of respect for people who are willing to step forward and admit their responsibility." Id. The Defendant also waived his right to have a sentencing jury. Id. At the sentencing hearing, Tunkey adopted the testimony that the Defendant had given during his plea colloquy and argued that the Defendant's evident remorse and his willingness to face the consequences of his actions should persuade the trial court to impose life imprisonment rather than death. Id. Tunkey also successfully

excluded the Defendant's "rap sheet" from evidence. Id. However, Judge Fuller, found six (6) statutory aggravating circumstances and no statutory mitigation and therefore sentenced the Defendant to death for each killing. Washington, 362 So.2d at 662-664.

Almost five years later represented by different counsel, the Defendant filed a motion for collateral relief pursuant to Rule 3.850 Florida Rules of Criminal Procedure claiming that his counsel was ineffective at the time of sentencing. A8. The primary focus of the Defendant's complaint was Tunkey's "failure" to investigate and fully develop character evidence that might have been presented to Judge Fuller as non-statutory mitigation. A8-A9.

Without conducting an evidentiary hearing, the Florida trial court rejected the Defendant's motion, relying upon the watershed opinion in Knight v. State, 394 So.2d 997 (Fla. 1981)[3]. Specifically the state trial court found that the affidavits of friends and relatives presented little more information than the Defendant presented himself at the plea colloquy. A221. The state trial court also

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3 Knight set a four-step process by which a defendant's claim of ineffective assistance of counsel should be examined:

"In determining whether defendant has been provided with reasonably effective assistance of counsel, we believed the following four-step process encompassed in United States v. DeCoster (DeCoster III), 624 F.2d 196 (D.C. Cir. 1979)(en banc), provides a means to discover a true miscarriage of justice and yet does not place the judiciary in the role interfering with defense counsel's legal and tactical conduct at trial or on appeal. We adopt the following four principles as a standard to whether an attorney has provided reasonably effective assistance of counsel to his client.

found that psychiatric reports presented by the Defendant also would have clearly established elements of the aggravating

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"First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading."

"Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel. As was explained by Judge Leventhal in DeCoster III: "to be 'below average' is not enough, for that is self evidently the case half the time. The standard of shortfall is necessarily subjective, but it cannot be established merely by showing that counsel's acts of omissions deviated from a checklist of standards." 624 F.2d at 215. We recognize that in applying this standard, death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances.""Third, the defendant has the burden to show that this specific serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings. In the case of appellate counsel, this means the deficiency must

circumstances which the State was required to prove in order to impose the death penalty. Id. Additionally, the witnesses who submitted affidavits were apparently also unaware that the Defendant did have a substantial criminal history. A222-A223.

On appeal the Supreme Court of Florida also rejected the Defendant's claims relying upon Knight v. State, holding that there was no likelihood that the outcome of the cause was

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concern an issue which is error affecting the outcome, not simply harmless error. This requirement that a defendant has the burden to show prejudice is the rule in the majority of other jurisdictions."

"Fourth, in the event a defendant does show substantial deficiency and presents a prima facie showing of prejudice, the state still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact. This opportunity to rebut applies even if a constitutional violation has been established. Chapman v. California, 386 U.S. 18 (1967); DeCoster III." [Emphasis added, footnote omitted]. 394 So.2d at 1000-1001.

affected by the "omissions" the Defendant now claims were the result of ineffective assistance of counsel. A245-A246. The Court concluded that, "the appellant has failed under the Knight criteria to make a prima facie showing of substantial deficiency or possible prejudice and has failed to such a degree that we believe to the point of moral certainty, that he is entitled to no relief. . ." [Emphasis added]. A247. Specifically, the Florida Supreme Court observed that even the most zealous advocate could not have saved the Defendant from his fate[4]. A246-A246.

In the United States District Court during the course of the evidentiary

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[4]In the State trial court order in denying collateral relief the Court characterized William Tunkey as, "one of the leading criminal defense attorneys in Dade County. . ." (A214).

hearing, Tunkey testified that he chose not to call any witnesses for tactical reasons and because the Defendant did not want anyone there. Judge Fuller testified that the new evidence offered by the Defendant would not change the sentence of death. See, A183-A184 (Tunkey); A282 (Fuller). Relying upon the standard of review in United States v. DeCoster, 624 F.2d 196 (D.C. Cir. 1979)(en banc) ("DeCoster III") and Knight v. State, supra, the United States District Court rejected the Defendant's claims finding that the Defendant had not been prejudiced in any way whatsoever by Mr. Tunkey's actions or inactions. A282-A283. In reviewing the affidavits and "new evidence" proposed by the Defendant, the United States District Court concluded that the proposed evidence, "cannot reasonably be characterized as evidence

of extreme mental or emotional disturbance [n]or does it provide persuasive rationalization for petitioner's extended and calculated course of violence." [Emphasis added]. Id.

The Eleventh Circuit in a sharply divided panel opinion, rejected both Knight and DeCoster and reversed holding that all a defendant need show to establish ineffective assistance of counsel, is that evidence was omitted which might be "helpful to him." Washington v. Strickland, 673 F.2d 879, at 901-902 (5th Cir. 1982).

On May 14, 1982, the Eleventh Circuit sua sponte vacated the panel opinion and ordered rehearing en banc. 679 F.2d 23 (5th Cir. 1982). Upon en banc rehearing the Eleventh Circuit expressly rejected United States v. DeCoster, (A69-

A72; A79-A80) and "[struck] down the Florida Supreme Court's standard for reviewing the ineffective assistance of counsel claims set forth in Knight v. State . . ."(A189; see also, A11 at n 5). The Court held: 1) that the district court had failed to properly consider the claim that Tunkey was ineffective because he failed to investigate the case; 2) that the court had improperly allocated the burden of proof to the Defendant to show a likely affect upon the outcome of the cause and 3) that the testimony of Judge Fuller was improperly admitted as the mental impressions of the trier of fact[5]. A21-A82.

The present decision has been stayed pending review in this Court. Subsequently, on January 20, 1983, in Armstrong v.

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[5] The en banc court erroneously considered that the State's cross-appeal addressed only the question of the abuse of the Writ. 693 F.2d at 1264, n 34 (A168).

State, ___So.2d_ (Fla. 1983), Fla.S.Ct. Case No. 61,871 (A293-A321) the Florida Supreme Court expressly recognized the Eleventh Circuit's opinion herein but declined to follow it. Instead, the Florida Supreme Court reaffirmed its view that Knight is "constitutionally correct." More than thirty-five (35) states are considering or have agreed to submit an amicus brief in support of the present petition, asking this court to accept review of this matter.

V

REASONS FOR GRANTING THE PETITION

All of the reasons in Rule 17 of the Rules of the Supreme Court and the substantive law are present and warrant the exercise of this Court's jurisdiction in the case at bar.

A) CONFLICT WITH THE HIGHEST STATE COURT IN THE SAME JURISDICTION AND EXPRESS CONFLICT WITH ANOTHER CIRCUIT

The Eleventh Circuit sitting en banc has expressly and directly rejected the en banc opinion of the District of Columbia Circuit Court of Appeals in DeCoster as the standard of review of ineffective assistance of counsel claims and overruled the Florida Supreme Court in Knight, which relied wholly upon DeCoster in formulating the standard in Florida. In Armstrong v. State, supra, the Florida Supreme Court expressly recognized the present Eleventh Circuit opinion but declined to follow it, reaffirming its view that Knight[6] is "legally and constitutionally" correct. A305-A306.

Upon the face of Armstrong and the present Eleventh Circuit decision, it is

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[6]All Florida collateral claims have been reviewed upon the basis of the standard in Knight.

therefore plainly evident that there exists a substantial difference of opinion upon an important federal constitutional question between the highest state court and the highest federal court sitting en banc in the same jurisdiction and a direct conflict with another circuit court sitting en banc on the same federal question. This Honorable Court manifestly has jurisdiction in such a circumstance, see, e.g., Lego v. Twomey, 404 U.S. 477, at 479 n 1, (1972); Anderson v. Maryland, 427 U.S. 463, at 470 n 5 (1976) and should exercise jurisdiction since, "it is clear that the conflict is one that can be effectively resolved only by the prompt action of the Supreme Court alone." Harlan, J., "Some Aspects of the Judicial Process in the Supreme Court of the United States," 33 Australian L.J. 108 (1959).

The importance of the present matter also cannot be gainsaid. As Justice White recently stated, "[a] more fundamental question to the administration of criminal justice in the State and Federal Courts can scarely be envisioned." Romero v. United States, 31 Crim.L.R. 4035 (1982). Surely, this Court must also place substantial weight upon the importance of this matter, where more than thirty-five (35) states may join Florida in urging this Court to accept review[7]. Finally, for the people of Florida, the burden and chaos engendered by rehearings and retrials would be

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[7]At the filing of this brief an amicus brief in support of jurisdiction is being proposed for submission by Montana; Alabama; Arizona; Arkansas; California; Colorado; Delaware; Georgia; Hawaii; Idaho; Indiana; Illinois; Kansas; Kentucky; Louisiana; Maryland; Mississippi; Missouri; New Jersey; New Mexico; Oklahoma; South Dakota; Texas; Utah; Vermont; Virginia; Washington Wyoming; Massachusetts; South Carolina; West Virginia; Minnesota; Nevada and Ohio.

unconscionable if the Supreme Court of Florida is correct in its views[8].

B) CONFLICT AMONG OTHER CIRCUITS

Widespread conflict among the circuits and state jurisdictions exists as an additional compelling reason for the exercise of this Court's jurisdiction. Decisions of the First, Second, Fifth, Seventh, Eighth and Ninth circuits, consistent with DeCoster and Knight appear to require that a

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[8]On January 25, 1983 the Court accepted Barefoot v. Estelle, 32 Crim.L.R. 4180 (1983) involving stays of execution in collateral proceedings. On February 23, 1983 the Court accepted United States v. Cronic, 32 Cr.L.R. 4193 (1983) involving a claim of ineffective assistance of counsel raised for the first time on direct appeal. The present cause concerning the burden and extent of proof required for claims of ineffective counsel and the admissibility of the testimony of a trial judge is a most timely and appropriate case to be decided with Barefoot and Cronic.

defendant demonstrate that his claims have a likelihood of affecting the outcome of the cause[9]. However, other decisions of those same courts have also applied a minimal showing of prejudice

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[9]See, e.g., LiPuma v. Commissioner Department of Corrections, 560 F.2d 84, at 92 (2d Cir. 1977), cert. den., 434 U.S. 861 (1977); United States v. Williams, 575 F.2d 388, at 393 (2d Cir. 1978), cert.den., 439 U.S. 842 (1978); Washington v. Estelle, 648 F.2d 276, at 279 (5th Cir. 1981); Guzzardo v. Benston, 643 F.2d 1300 (7th Cir. 1981); United States v. Cooper, 580 F.2d 259, at 263 n 8 (7th Cir. 1978); United States v. Ingram, 477 F.2d 236, at 240 (7th Cir. 1973), cert. den., 414 U.S. 840 (1973); McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974); Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978)(en banc), cert.den., 440 U.S. 974 (1979); United States v. Altamirano, 633 F.2d 147, at 152-153 (9th Cir. 1980).

requirement [10]. The Third, Fourth, Sixth and Tenth circuits have either presumed prejudice after an initial showing of ineffective counsel or not required any showing of prejudice by a defendant[11]. In direct contrast, at least twenty (20)

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[10]See e.g., Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980) (assuming prejudicial error from failure to investigate); United States ex rel. Healey v. Cannon, 553 F.2d 1052, at 1057, n 7 (7th Cir. 1977), cert. den., 434 U.S. 874 (1977)(the harmless error rule is inapplicable to ineffective assistance of counsel claims); Wade v. Franzen, 678 F.2d 56 (7th Cir. 1982).

[11]See, e.g., Baynes v. United States 687 F.2d 659 (3d Cir. 1982)(any showing of harm requires a new trial); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977) (en banc), cert.den., 435 U.S. 1011 (1978)(assuming prejudice if attorney is not "within the range of competence")' United States v. Gelardy, 567 F.2d 863, at 865 n. 1 (6th Cir. 1978), cert. den., 439 U.S. 842 (1978)(same); United States v. Golub, 638 F.2d 185 (10th Cir. 1980)

states either expressly adhere to the standard in DeCoster and Knight or have centered their analysis of ineffective counsel claims upon a due process and fair trial analysis as to whether a defendant has demonstrated any likely effect upon the outcome of the cause[12]. At least another twelve (12) states, while modifying the "farce and mockery"

(proof of specific prejudice is not required); United States v. Porterfield, 624 F.2d 122 (10th Cir. 1980)(no prejudice required).

[12]See, State v. Hyman, 281 S.C.2d 209 (S.C. 1981); Commonwealth v. Borelli, 431 A.2d 1067 (Pa. 1981); Cason v. State, 610 S.W. 2nd 891 (Ark. 1981); Baker v. State, 403 N.E. 2d 1069 (Ind. 1980); State v. LePage, 630 P.2d 674 (Idaho 1981); State v. Tucker, 539 P.2d 556 (Idaho 1975); see also, Blackmon v. State, 274 Ark. 202, 623 S.W. 2d 184 (1981); People v. McClure, 190 Colo. 250, 545 P.2d 1038 (1976); Merida v. State, 383 N.E. 2d 1043 (Ind. 1979); Hall v. Commonwealth, 557 S.W. 2d 420 (Ky. 1977); State v. Billiot, 370 So.2d 539 (La. 1979); Lizotte v. State, 247 A.2d 98 (Me. 1968); Berry v. State, 345 So.2d 613 (Miss. 1977); State

standard for review of claims of ineffective counsel, still maintain an outcome oriented, fair trial test[13]. The apparent conflict with the foregoing decisions also warrants jurisdiction under Rule 17 and the substantive law. The express purpose of the framers of the Constitution in establishing this Court

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v. Miller, 453, 568 P.2d 130 (1977); Seales v. State, 580 S.W. 2d 733 (Mo. 1979); White v. State, 591 P.2d 266 (Nev. 1979); State v. Edge, 57 N.J. 580, 274 A.2d 42 (1971); Zimmer v. Langlois, 95 R.I. 446, 188 A.2d 89 (1963); State v. Brech, 84 S.D. 177, 169 N.W. 2d 242 (1969); Heinlin v. Smith, 542 P.2d 1081 (Utah, 1975); Hoffer v. Peyton, 207 Va. 302, 149 S.E.2d 893 (1966); State v. Johnson, 92 Wash. 2d 671, 600 P.2d 1249 (1979).

[13]See, Risher v. State, 523 P.2d 421 (Alaska 1974); State v. Watson, 653 P.2d 351 (Ariz. 1982); People v. Pope, 152 Cal. Rptr. 732, 590 P.2d 859 (1979); State v. Clark, 170 Conn. 273, 365 A.2d 1167 (1976); People v. Greer, 79 Ill.2d 103, 402 N.E. 2d 203 (1980); People v. Kees, 32 Ill.2d 299 at 305, 205 N.E. 2d 729 (1965); Commonwealth v. Satterfield, 373 Mass. 109, 364 N.E. 2d 1260 (1977); White v. State, 309 Minn. 476, 248 N.W. 2d 281 (1976); Johnson v. State, 620 P.2d

was "to secure the national rights [and] uniformity of Judgmts." Letter from Chief Justice Hughes March 23, 1937, quoting John Rutledge of South Carolina, reprinted in 81 Cong.Rec. 2814-2815 (1937). That supreme purpose of this Court would be properly met by the exercise of jurisdiction herein.

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11 (Okla. Cr. 1980); Orona v. State, 638 P.2d 1077 (N.M. 1982); State v. Sanchez, 652 P.2d 1232 (N.M. 1982); People v. DeGraffenried, 19 Mich. App. 702, 173 N.W. 2d 317 (1969); Benoit v. State, 561 S.W. 2d 810 (Tex. Crim. 1977); State v. Hester, 45 Ohio St.2d 71, 341 N.E.2d 304 (1976); see, also, Seales v. State, 580 S.W. 2d 733 (Mo. 1979) (applying fair trial and Eighth Circuit "reasonable competent attorney" test); Woody v. United States, 369 A.2d 592 (D.C. App. 1977) ("gross incomptence" test applied to claims raised after trial); Harris v. State, 293 A.2d 291 (Del.Sup. 1972) ("genuine and effective representation" test); Schoonover v. State, 218 Kan. 377, 543 P.2d 881 (1973) ("complete absence of counsel" test); Schoonover v. State, 2 Kan. App. 2d 481, 582 P.2d 292 (1978); People v. Garrow, 51 App. Div.2d 814, 379 N.Y.S.2d 185 (1976) ("farce and mockery"); Lewis v. State, 369 So.2d 542 (Ala.App. 1978), cert. den. 367 So.2d 542 (Ala. 1978) ("sham" test); In Re Cronin, 133 Vt. 234, 336 A.2d 164 (1975) ("mockery of justice").

C) CONFLICT WITH UNITED STATES SUPREME COURT DECISIONS UPON ISSUES WHICH SHOULD BE DECIDED BY THIS COURT.

1) Improper Extension Of McMann

In McMann v. Richardson, 397 U.S. 759, 770-771 (1970) in considering only the validity of a guilty plea following a coerced confession, the Court in dicta observed that counsel's advice to plead guilty should be viewed as to whether the advice, "was within the range of competency demanded of attorneys in criminal cases." Without guidance from this Court, various courts have extended the McMann "standard" to all Sixth Amendment ineffective assistance claims in general[14]. To that end, the Eleventh

[14]See, e.g., United States v. Bosch, 584 F.2d 1113, at 1121 (1st Cir. 1978); Marzullo v. Mary- land, 561 F.2d 540, at 543 (4th Cir. 1977)(en banc); Moore v. United States, 432 F.2d 730, at 736 n. 25 (3d Cir. 1976) (en banc).

Circuit has based its opinion upon the "laundry list" of errors theory of ineffective assistance of counsel as proposed by Judge Bazelon in "DeCoster I"[15] and "DeCoster II",[16] which was specifically rejected by the en banc court in DeCoster III[17]. Contrary to the present decision, DeCoster, Knight and the "farce and mockery" decisions[18], focus upon whether a defendant has

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[15]United States v. DeCoster, 487 F.2d 1196 (D.C. Cir. 1973).

[16]United States v. DeCoster, 624 F.2d 300 (D.C. Cir. 1976)

[17]See, also, Darcy v. Handy, 351 U.S. 454 at 462-263 (1956)(merely because counsel did not complete a list of things he could do does not establish error in the constitutional sense).

[18]See, e.g. United States v. Williams, 575 F.2d 388 at 393 (2d Cir. 1978); United States v. Wight, 176 F.2d 376, at 379 (2d Cir. 1949), cert. den., 338 U.S. 950 (1950); United States v. Ramirez, 535 F.2d 125, at 129 (1st Cir. 1976).

been denied a fundamentally fair trial and thus fundamental due process. Contrary to the proponents of purely Sixth Amendment analysis[19] this Court has also consistently held that the central consideration upon ineffective counsel claims is whether a defendant has been denied fundamental due process and a fundamentally fair trial. See, United States v. Frady, _ U.S.___, 102 S.Ct. 1584 (1982); Engle v. Isaac, __ U.S.___, 102 S.Ct. 1558 (1982)[20].

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[19]See, e.g. People v. Pope, 23 Cal.3d 412, 590 P.2d 859 (1979)(abandoning "due process" test for a solely Sixth Amendment based test).

[20]See, also, Smith v. Phillips, __ U.S.___, 102 S.Ct. 940 (1980)(fair trial and fundamental due process claims must be examined from the standpoint of the effect if any upon the outcome of the trial); Kentucky v. Wharton, 441 U.S. 786, at 790-791 (1979) (same); Henderson v. Kibbe, 431 U.S. 145 (1977); United

2) Burden of Proof

With respect to the burden of proof, in Frady, the Court held that in federal collateral proceedings, a defendant must bear a greater burden of proof entirely. 102 S.Ct. at 1593. In a companion case to Frady, in Engle v. Isaac, the Court explained that federal collateral attacks upon final state courts judgments even more strongly necessitate a Defendant carrying the whole burden to show

States v. Agurs, 427 U.S. 97 (1976); Cupp v. McNaughten, 414 U.S. 141, at 146 (1975)("Before a Federal Court may overturn a conviction resulting from a state trial...it must be established not merely that the [State's action] is undesirable, erroneous; or even'universally condemned', but that it violated some right which was guaranteed to the defendant by the XIV Amendment"); Chambers v. Maroney, 399 U.S. 42, at 53-54 (1970)(even if counsel was ineffective, the whole record reveals no effect upon the outcome); Darcy v. Handy, 351 U.S. at 462-463; see, also, Rose v. Lundy, ___U.S.___, 102 S.Ct. 1198 at 1216 (1982)(Stevens, J., dissenting: the purpose of the writ is to address fundamental unfairness).

constitutional error because of special finality and comity concerns. 102 S.Ct. at 1575.

3) Degree of Proof

With respect to the degree of proof required the most compelling demonstration of both jurisdiction and error is the direct conflict with the seminal decision of this court in United States v. Agurs. Essentially, the Defendant in the present case seeks to overturn the result below with "new evidence" which he claims his counsel failed to produce. In United States v. Agurs, in assessing the effect of "new evidence" upon a claim for a new trial, the court clearly delimited claims of constitutional error based upon the effect upon tne outcome of the cause. 427 U.S. at 109-110. More important to our present analysis however, the Agurs court conclusively held that complaints

of error concerning new evidence do not rise to constitutional magnitude unless there is a substantial likelihood that it would have affected the outcome of the cause:

> "It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." [footnote omitted; emphasis added]. Id., at 113.

Also consistent with Engle and Frady, the Agurs court additionally held that a defendant has a heavy burden of proof to show that the outcome of a trial would be different when the new evidence is from a "neutral" source (rather than the prosecution) as in the case at bar. Id. at 111.

4) Misapplication of Frady

The Eleventh Circuit in its opinion purports to apply the United States v.

Frady, in rejecting the outcome/fundamental fairness oriented proof explained in DeCoster and Knight. See, A56-A57. The circuit court citing Frady holds that a defendant must show only that the errors he complains of, "worked to his actual and substantial disadvantage." Id. However, this standard is only part of this Court's holding in Frady. Under Frady, a defendant must also show that the errors he complained of were such that they, "infect[ed] his entire trial with error of constitutional dimension" [emphasis added]. 102 S.Ct. at 1596. The Frady court in fact, rejected the defendant's claims because there was no affect upon the outcome of the cause where the evidence against the defendant was overwhelming. 102 S.Ct. at 1596-1597; compare also, United States v. Valenzuela-Bernal, __U.S.__, 102 S.Ct. 3440 (1982)(with respect to Sixth

Amendment claims in deportation proceedings, a defendant must show that his claims would have affected the outcome of the proceedings); Hooper v. Evans, U.S., 102 S.Ct. 2049 (1982). The present decision by the Eleventh Circuit therefore constitutes a complete misreading of United States v. Frady, and a substantial departure from both the Rule in Frady and the proper constitutional analysis of the burden and extent of proof required by the decisions of the United States Supreme Court. To the contrary, the apparent intent of the Eleventh Circuit en banc majority in this cause, is to relax the standard for review of constitutional error, and the Defendant's burden of proof directly in the face of Frady, Agurs and the foregoing authority. Also, by creating "constitutional error" from matters on a

list not related to the outcome of the cause, the en banc court would open a Pandora's Box of reversible error in virtually any cause. The perpetuation of such a vague, semantic jungle undermines the criminal justice system and public confidence in the ability of the system to render certain and final judgments[21].

D) MISAPPLICATION OF FAYERWEATHER V. RITCH

The Eleventh Circuit's reliance upon Fayerweather v. Ritch, 195 U.S. 276 (1904), to exclude the testimony of Judge Fuller is a complete departure from Agurs, and the principals therein and constitutes a plainly erroneous reading of Fayerweather. In the present case, Judge Fuller was called upon with respect

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[21]For purposes of preservation, the State also vigorously contends here that the Defendant has abused the great writ by his deliberate and calculated delay in presenting his claims. See, A82, n 34.

to the effect of "new evidence", consistent with Agurs. Judge Fuller did only that which he must do under Agurs in evaluating "new evidence" and its effect if any upon the outcome of the proceeding [22]. Therefore Fayerweather has been plainly misconstrued or should be overruled.

The Eleventh Circuit has also created a virtually untenable situation for the State in avoiding new trials in federal collateral proceedings. The Defendant may, by only a mere preponderance of the evidence, overturn his conviction, which was established beyond a reasonable doubt. The State is then placed in the position of proving that the Defendants

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[22]The Eleventh Circuit's analysis also herein totally undercuts the effect of this court's decision in United States v. Tucker, 404 U.S. 443 (1972), which contemplates precisely the present circumstance wherein the trial judge is ordered to reconsider his verdict in terms of a change in the evidence. See, also, Smith v. Phillips, _ U.S.__, 102 S.Ct. 940 (1982).

conviction should be sustained again beyond a reasonable doubt because there was no affect upon the outcome of the case, without being permitted to produce the best evidence to support such a conclusion. Certainly the trial judge in any circumstance is the best evidence of that event as reflected by this court's analysis in Agurs and similar decisions[23]. It is also irrational to suggest that Judge Fuller's testimony would be excluded if he had said that he would not impose the death penalty based upon the new evidence. Therefore, in the present cause this Honorable Court should accept jurisdiction herein based upon a

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[23]See also, United States v. Tucker, 404 U.S. at 452 (The Chief Justice and Blackmun, J. dissenting: "Surely Judge Harris, of all people is the best source of knowledge as to the effect, if any, of these two convictions in his determination of the sentence to be imposed.")

plain misreading of Fayerweather and erroneous construction of substantial federal constitutional questions.

E) SUBSTANTIAL DEPARTURE FROM ACCEPTED OR USUAL COURSE OF JUDICIAL PROCEEDINGS.

Even though the penalty herein may be death, yet another extraordinary review of that penalty is not the function of the habeas corpus writ or this Court and its inferior courts. See, Spenkellink v. Wainwright, 578 F.2d 582 at 613-614 (5th Cir. 1978), cert. den., 440 U.S. 976 (1979). Contrary to Spenkellink the Eleventh Circuit herein has permitted the Defendant to drag the federal courts into the substantive state sentencing process.

Furthermore, contrary to Sumner v. Mata, 449 U.S. 539 (1981) and Townsend v. Sain, 372 U.S. 293 (1963), neither the District Court nor the Circuit Court gave any consideration whatsoever to the presumptively valid determinations by both

the Supreme Court of Florida and the State trial court that Turkey was not ineffective. The federal courts discarded these carefully considered opinions by ignoring them. Is a state judgment going to be set aside simply because a federal court disagrees or is not in philosophical accord with a state judgment or sentence, under the guise of calling it "a mixed question of law and fact?" and then decides the issue de novo[24] or are federal courts going to be bound by a standard which restores some semblence of integrity to state court judgments?

The Defendant's claim should have been rejected on the face of the record without any requirement of an evidentiary hearing. The State would therefore urge

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24. See, Pullman - Standard v. Swint, U.S.__, 102 S.Ct. 1781, at 1789-1791 (1982).

the Court to grant Certiorari on this issue and eliminate the present abuse of the Writ.

VI

CONCLUSION

This Court should accept and decide this issue of compelling national importance.

RESPECTFULLY SUBMITTED on this____day of March, 1983, at Tallahassee, Florida.

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